



## **SMALL BUSINESS ADMINISTRATION**

### **13 CFR Parts 126 and 134**

#### **RIN 3245-AH88**

#### **HUBZone Appeal Process**

**AGENCY:** U.S. Small Business Administration.

**ACTION:** Proposed rule.

**SUMMARY:** The U.S. Small Business Administration (SBA) proposes to amend the rules of practice of its Office of Hearings and Appeals (OHA) and the Historically Underutilized Business Zone (HUBZone) Program. Specifically, SBA proposes to implement procedures authorizing appeals to OHA from protest determinations regarding the status of a concern as a certified HUBZone small business concern. These amendments are issued in accordance with provisions of the National Defense Authorization Act for Fiscal Year 2022.

**DATES:** Comments will be accepted until [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

**ADDRESSES:** You may submit comments, identified by RIN 3245-AH88, by any of the following methods:

- Federal eRulemaking Portal: <https://www.regulations.gov> and follow the instructions for submitting comments.
- Mail (for paper, disk, or CD-ROM submissions): Laura Maas, HUBZone Program, 409 Third Street SW, Washington, DC 20416.

*Instructions:* All submissions received must include the agency name and docket number or Regulatory Information Number (RIN) for this rulemaking. All comments received will be posted on <https://www.regulations.gov>. If you wish to submit confidential business information (CBI) as defined in the User Notice at

<https://www.regulations.gov>, please submit the comments to [laura.maas@sba.gov](mailto:laura.maas@sba.gov) and highlight the information that you consider to be CBI and explain why you believe this information should be held confidential. SBA will make a final determination as to whether the comments will be published or not.

**FOR FURTHER INFORMATION CONTACT:** Laura Maas, HUBZone Program, 202-205-7341, [laura.maas@sba.gov](mailto:laura.maas@sba.gov). This phone number may also be reached by individuals who are deaf or hard of hearing, or who have speech disabilities, through the Federal Communications Commission’s TTY-Based Telecommunications Relay Service teletype service at 711.

**SUPPLEMENTARY INFORMATION:**

Section 864 of the National Defense Authorization Act for Fiscal Year 2022 (NDAA 2022) authorizes SBA’s Office of Hearings and Appeals (OHA) to decide all appeals from HUBZone status protest determinations, which are currently decided by the Associate Administrator of Government Contracting and Business Development. Section 864 requires SBA to publish a rule implementing this authority by December 27, 2022. To implement this statutory requirement, this proposed rule would revise the HUBZone regulations at 13 CFR 126.805 to specify that HUBZone appeals are processed by OHA in accordance with the procedures in part 134. This proposed rule would amend the regulations pertaining to OHA’s jurisdiction at subparts A and B of 13 CFR part 134 to include appeals from HUBZone status protest determinations. Finally, the proposed rule would create a new subpart M in 13 CFR part 134 to set out the rules of practice for appeals from HUBZone status protest determinations.

**Section-by-Section Analysis**

A. Section 126.103

SBA proposes to amend the HUBZone regulations at § 126.103 by deleting the definition for “AA/GC&BD.” The only references to this role in the HUBZone

regulations are in relation to HUBZone status protest appeals, and the AA/GCBD will no longer have this responsibility.

B. Sections 126.309, 126.803

SBA proposes to amend the HUBZone regulations at §§ 126.309 and 126.803 to change the references to appeal decisions made by the AA/GCBD to appeal decisions made by OHA.

C. Section 126.805

SBA proposes to revise §126.805, which addresses the procedures for appeals of HUBZone status protest determinations, to provide that such appeals may be filed in accordance with part 134 of title 13 of the Code of Federal Regulations.

D. 13 CFR Part 134 Subparts A and B

SBA proposes to amend § 134.102, the rules for establishing OHA jurisdiction, to add appeals from HUBZone status protest determinations, as a new type of proceeding over which OHA would have jurisdiction. New § 134.102(x) would allow OHA to hear appeals from HUBZone determinations.

SBA also proposes to amend § 134.201(b) by adding a new paragraph (10) to include appeals from HUBZone status protest determinations. As a result of this new paragraph, existing § 134.201(b)(10) would be redesignated as § 134.201(b)(11).

E. 13 CFR Part 134 Subpart M

The rule proposes a new subpart M to cover the procedures for filing appeals of HUBZone status protest determinations.

Proposed § 134.1301 would provide that appeals under this new subpart would include any of the grounds for a HUBZone status protest specified in § 126.801 of the HUBZone regulations. Paragraph (b) would state that the provisions of subparts A and B of part 134 also apply to appeals of HUBZone status protest determinations. Paragraph

(c) would state that appeals from HUBZone status protest determinations are separate from size determinations.

Proposed § 134.1302 would establish standing to file an appeal from a HUBZone status protest determination.

Proposed § 134.1303 would establish timeliness for filing an appeal from a HUBZone status protest determination. SBA proposes that such appeals must be filed within ten (10) business days after the appellant receives the protest determination.

Proposed § 134.1304 would provide that if a timely appeal of a HUBZone status protest determination is filed after contract award, the contracting officer must consider whether performance can be suspended until an appellate decision is rendered. This section would also provide that where an appeal is filed before contract award, the contracting officer must withhold award until the appellate decision is rendered, unless the contracting officer has determined that award and performance of the contract is in the best interests of the government.

Proposed § 134.1305(a) would provide that an appeal petition must include the following: a copy of the protest determination; the date the appellant received the protest determination; a statement that the petitioner is appealing a HUBZone status protest determination issued by the D/HUB; a full and specific statement as to why the HUBZone status protest determination is alleged to be based on a clear error of fact or law, together with argument supporting such allegation; the solicitation number, the contract number (if applicable), and the name, address, and telephone number of the contracting officer; and the name, address, telephone number, facsimile number, and signature of the appellant or its attorney. Paragraph (b) would require that the appellant serve copies of the appeal upon the D/HUB, the contracting officer, protested concern or the protester, and SBA's Associate General Counsel for Procurement Law. Paragraph (c) would require all appeal petitions to include a certificate of service. Paragraph (d) would

authorize OHA to dismiss appeal petitions that do not meet all the requirements of § 134.1305.

Proposed § 134.1306 would apply the provisions in § 134.204, regarding the service and filing requirements of all pleadings and submissions.

Proposed § 134.1307 would require the D/HUB to send OHA the entire case file relating to the protest decision upon receipt of the appeal petition.

Proposed § 134.1308 would provide that the standard of review for an appeal of a HUBZone status protest determination is whether the D/HUB's determination was based on clear error of fact or law, and that the appellant bears the burden of proof by a preponderance of the evidence.

Proposed § 134.1309 would provide that an appeal from a HUBZone status protest determination will be dismissed if the appeal is untimely under § 134.1303, or if the matter has been decided or is the subject of adjudication before a court of competent jurisdiction over such matters.

Proposed § 134.1310 would permit responses to the appeal to be filed within fifteen business days after service of the appeal petition.

Proposed § 134.1311 would not allow for discovery or oral hearings in appeals from HUBZone status protest determinations.

Proposed § 134.1312 would prohibit new evidence in appeals from HUBZone status protest determinations.

Proposed § 134.1313 would provide that the record for a HUBZone status protest appeal will close when the time to file a response to an appeal petition expires.

Proposed § 134.1314 would provide that OHA will decide an appeal within 45 calendar days after the close of record.

Proposed § 134.1315 would provide that OHA's decision is the final agency decision and would provide that the effects of the decision on the procurement at issue are explained in 13 CFR 126.803(e).

Proposed § 134.1316 would provide that OHA may reconsider an appeal decision within twenty (20) calendar days after the decision is issued, or OHA may remand a proceeding to the D/HUB for a new HUBZone status protest determination.

**Compliance With Executive Orders 12866, 12988, 13132, and the Paperwork Reduction Act (44 U.S.C. Ch. 35), the Regulatory Flexibility Act (5 U.S.C. 601-612), the Congressional Review Act ((5 U.S.C. 801–808)**

**Executive Order 12866**

The Office of Management and Budget has determined that this rule is not a “significant regulatory action” under Executive Order No. 12866. This proposed rule would amend the rules of practice for the SBA's OHA to implement procedures for appeals from HUBZone status protest determinations. As such, the rule has no effect on the amount or dollar value of any Federal contract requirements or of any financial assistance provided through SBA. Therefore, the rule is not likely to have an annual economic effect of \$100 million or more, result in a major increase in costs or prices, or have a significant adverse effect on competition or the United States economy. In addition, this rule does not create a serious inconsistency or otherwise interfere with an action taken or planned by another agency, materially alter the budgetary impact of entitlements, grants, user fees, loan programs or the rights and obligations of such recipients, nor raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

**Executive Order 12988**

This action meets applicable standards set forth in section 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden. The action does not have retroactive or preemptive effect.

#### Executive Order 13132

This rule does not have Federalism implications as defined in Executive Order 13132. It will not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in the Executive Order. As such, it does not warrant the preparation of a Federalism Assessment.

#### Paperwork Reduction Act

The SBA has determined that this rule does not impose additional reporting or recordkeeping requirements under the Paperwork Reduction Act, 44 U.S.C. Chapter 35.

#### Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980, as amended (RFA), 5 U.S.C. 601-612, requires Federal agencies to prepare an initial regulatory flexibility analysis (IRFA) to consider the potential impact of the regulations on small entities. Small entities include small businesses, small not-for-profit organizations, and small governmental jurisdictions. Section 605 of the RFA allows an agency to certify a rule, in lieu of preparing an IRFA, if the rulemaking is not expected to have a significant economic impact on a substantial number of small entities.

This proposed rule would revise the regulations governing cases before SBA's Office of Hearings and Appeals (OHA), SBA's administrative tribunal. These regulations are procedural by nature. Specifically, the proposed rule would establish rules of practice for the SBA's OHA to hear appeals from HUBZone status protest determinations. While SBA does not anticipate that this proposed rule would have a significant economic impact on any small business, we do welcome comments from any small business setting

out how and to what degree this proposed rule would affect it economically. Therefore, the Administrator of SBA certifies under 5 U.S.C. 605(b) that this proposed rule would not have a significant economic impact on a substantial number of small entities.

Congressional Review Act, 5 U.S.C. Ch. 8

Subtitle E of the Small Business Regulatory Enforcement Fairness Act of 1996, also known as the Congressional Review Act or CRA, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. SBA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States. A major rule under the CRA cannot take effect until 60 days after it is published in the *Federal Register*. The Office of Information and Regulatory Affairs has determined that this rule is not a “major rule” as defined by 5 U.S.C. 804(2). Therefore, this rule is not subject to the 60-day restriction.

**List of Subjects**  
**13 CFR Part 126**

Administrative practice and procedure, Government procurement, Penalties, Reporting and recordkeeping requirements, Small businesses.

**13 CFR Part 134**

Administrative practice and procedure, Claims, Equal access to justice, Lawyers, Organization and function (Government agencies).

For the reasons set forth in the preamble, SBA proposes to amend parts 126 and 134 of title 13 of the Code of Federal Regulations as follows:

**PART 126—HUBZONE PROGRAM**

1. The authority citation for part 126 is revised to read as follows:

**Authority:** 15 U.S.C. 632(a), 632(j), 632(p), 644 and 657a.

**§ 126.103 [Amended]**

2. Amend § 126.103 by removing the definition of “AA/GC&BD”.



### **§ 126.309 [Amended]**

3. Amend § 126.309 by removing “(the D/HUB’s decision if no appeal is filed or the decision of the AA/GCBD)” and adding in its place “(*i.e.*, the D/HUB’s decision if the protest determination is not appealed, or OHA’s decision if the protest determination is appealed)”.

4. Amend § 126.803 by:

a. In paragraph (e), revising the introductory text;

b. In paragraph (e)(1)(ii)(B), removing “the AA/GCBD” and adding in its place “OHA”;

c. In paragraph (e)(1)(iii), removing “(*i.e.*, the D/HUB’s decision if no appeal is filed, or the decision of the AA/GCBD if the protest is appealed)” and adding in its place “(*i.e.*, the D/HUB’s decision if the protest determination is not appealed, or OHA’s decision if the protest determination is appealed)”;

d. In paragraph (e)(2)(ii), removing “the AA/GCBD” and adding in its place “OHA”; and

e. In paragraph (e)(3), removing “(the D/HUB’s decision if no appeal is filed, or the decision of the AA/GCBD if the protest is appealed)” and adding in its place “(*i.e.*, the D/HUB’s decision if the protest determination is not appealed, or OHA’s decision if the protest determination is appealed)”.

The revision reads as follows:

### **§ 126.803 How will SBA process a HUBZone status protest and what are the possible outcomes?**

\* \* \* \* \*

(e) \* \* \* The determination is effective immediately and is final, unless overturned on appeal by SBA’s Office of Hearings and Appeals (OHA) pursuant to part 134 of this chapter.

\* \* \* \* \*

5. Revise § 126.805 to read as follows:

**§ 126.805 What are the procedures for appeals of HUBZone status protest determinations?**

The protested concern, the protester, or the contracting officer may file an appeal of a HUBZone status protest determination with SBA's Office of Hearings and Appeals (OHA) in accordance with part 134 of this chapter.

**PART 134—RULES OF PROCEDURE GOVERNING CASES BEFORE THE OFFICE OF HEARINGS AND APPEALS**

6. The authority citation for part 134 is revised to read as follows:

**Authority:** 5 U.S.C. 504; 15 U.S.C. 632, 634(b)(6), 634(i), 637(a), 648(l), 656(i), 657a, 657t and 687(c); E.O. 12549, 51 FR 6370, 3 CFR, 1986 Comp., p. 189.

Subpart J issued under 15 U.S.C. 657f.

Subpart K issued under 15 U.S.C. 657f.

Subpart L issued under 15 U.S.C. 636(a)(36); 636(a)(37); 636m.

Subpart M issued under 15 U.S.C. 657a; Sec. 864, Pub. L. 117-81, 135 Stat. 1852 (15 U.S.C. 634 note).

7. Amend § 134.102 by:

a. Removing the word “and” at the end of paragraph (v);

b. Removing the period at the end of paragraph (w) and adding “; and” in its place; and

c. Adding paragraph (x).

The addition reads as follows:

**§ 134.102 Jurisdiction of OHA.**

\* \* \* \* \*

(x) Appeals from HUBZone status protest determinations under part 126 of this chapter.

8. Amend § 134.201 by:

a. Removing the word “and” at the end of paragraph (b)(9);

b. Redesignating paragraph (b)(10) as paragraph (b)(11); and

c. Adding a new paragraph (b)(10).

The addition reads as follows:

**§ 134.201 Scope of the rules in this subpart.**

\* \* \* \* \*

(b) \* \* \*

(10) For appeals of protest determinations regarding the status of a concern as a certified HUBZone small business concern, in subpart M of this part; and

\* \* \* \* \*

8. Add subpart M to read as follows:

**Subpart M—Rules of Practice for Appeals of Protest Determinations Regarding the Status of a Concern as a Certified HUBZone Small Business Concern**  
Sec.

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|----------|---|
| 134.1301 | What is the scope of the rules in this subpart?   |
| 134.1302 | Who may appeal a HUBZone status protest determination?                                  |
| 134.1303 | What time limits apply to filing an appeal from a HUBZone status protest determination? |
| 134.1304 | What are the effects of the filing of an appeal on the procurement at issue?            |
| 134.1305 | What are the requirements for an appeal petition?                                       |
| 134.1306 | What are the service and filing requirements?   |
| 134.1307 | What are the requirements for transmitting the protest file?                            |
| 134.1308 | What is the standard of review?   |
| 134.1309 | When will a Judge dismiss an appeal?  |
| 134.1310 | Who can file a response to an appeal petition and when must such a response be filed?   |
| 134.1311 | Will the Judge permit discovery and oral hearings?                                      |
| 134.1312 | What are the limitations on the introduction of new evidence?                           |
| 134.1313 | When is the record closed?  |
| 134.1314 | When must the Judge issue his or her decision?  |
| 134.1315 | What are the effects of the Judge's decision on the procurement at issue?               |
| 134.1316 | Can a Judge reconsider an appeal decision?  |

**§ 134.1301 What is the scope of the rules in this subpart?**

(a) The rules of practice in this subpart apply to all appeals to OHA from formal protest determinations made by the Director of SBA's Office of HUBZone (D/HUB) in connection with a HUBZone status protest. Appeals under this subpart include any of the grounds for a HUBZone status protest specified in § 126.801 of this chapter, as well as

appeals from determinations by the D/HUB that the protest was premature, untimely, nonspecific, or not based upon protestable allegations.

(b) Except where inconsistent with this subpart, the provisions of subparts A and B of this part apply to appeals listed in paragraph (a) of this section.

(c) Appeals relating to formal size determinations and NAICS Code designations are governed by subpart C of this part.

#### **§ 134.1302 Who may appeal a HUBZone status protest determination?**

Appeals from HUBZone status protest determinations may be filed with OHA by the protested concern, the protester, or the contracting officer responsible for the procurement affected by the protest determination.

#### **§ 134.1303 What time limits apply to filing an appeal from a HUBZone status protest determination?**

Appeals from a HUBZone status protest determination must be commenced by filing and serving an appeal petition within ten (10) business days after the appellant receives the HUBZone status protest determination (*see* § 134.204 for filing and service requirements). OHA shall dismiss any untimely appeal.

#### **§ 134.1304 What are the effects of the filing of an appeal on the procurement at issue?**

(a) If a timely appeal is filed after contract award, the contracting officer must consider whether performance can be suspended until an appellate decision is rendered.

(b) If a timely appeal is filed before contract award, the contracting officer must withhold award until the appellate decision is rendered, unless the contracting officer has determined that award and performance of the contract is in the best interests of the government.

#### **§ 134.1305 What are the requirements for an appeal petition?**

(a) *Format.* An appeal from a HUBZone status protest determination must be in writing. There is no required format for an appeal petition. However, it must include the following information:

- (1) A copy of the protest determination;
- (2) The date the appellant received the protest determination;
- (3) A statement that the petitioner is appealing a HUBZone status protest determination issued by the D/HUB;
- (4) A full and specific statement as to why the HUBZone status protest determination is alleged to be based on a clear error of fact or law, together with argument supporting such allegation;
- (5) The solicitation number, the contract number (if applicable), and the name, address, and telephone number of the contracting officer; and
- (6) The name, address, telephone number, facsimile number, and signature of the appellant or its attorney.

(b) *Service of appeal.* The appellant must serve copies of the entire appeal petition upon each of the following:

- (1) The D/HUB at [hzappeals@sba.gov](mailto:hzappeals@sba.gov);
- (2) The contracting officer responsible for the procurement affected by a HUBZone determination;
- (3) The protested concern (the business concern whose HUBZone status is at issue) or the protester; and
- (4) SBA's Office of General Counsel, Associate General Counsel for Procurement Law at [OPLservice@sba.gov](mailto:OPLservice@sba.gov).

(c) *Certificate of Service.* The appellant must attach to the appeal petition a signed certificate of service meeting the requirements of § 134.204(d).

(d) *Dismissal*. An appeal petition that does not meet all the requirements of this section may be dismissed by the Judge at his/her own initiative or upon motion of a respondent.

**§ 134.1306 What are the service and filing requirements?**

The provisions of § 134.204 apply to the service and filing of all pleadings and other submissions permitted under this subpart, unless otherwise indicated in this subpart.

**§ 134.1307 What are the requirements for transmitting the protest file?**

Upon receipt of an appeal petition, the D/HUB will send to OHA a copy of the protest file relating to that determination. The D/HUB will certify and authenticate that the protest file, to the best of his or her knowledge, is a true and correct copy of the protest file.

**§ 134.1308 What is the standard of review?**

The standard of review for an appeal of a HUBZone status protest determination is whether the D/HUB's determination was based on clear error of fact or law. The appellant has the burden of proof, by a preponderance of the evidence.

**§ 134.1309 When will a Judge dismiss an appeal?**

The presiding Judge must dismiss the appeal if:

- (a) The appeal is untimely filed under § 134.1303;
- (b) The appeal does not, on its face, allege facts that if proven to be true, warrant reversal or modification of the determination; or
- (c) The matter has been decided or is the subject of adjudication before a court of competent jurisdiction over such matters; however, once an appeal has been filed, initiation of litigation of the matter in a court of competent jurisdiction will not preclude the Judge from rendering a final decision on the matter.

**§ 134.1310 Who can file a response to an appeal petition and when must such a response be filed?**

(a) *Who may respond.* Although not required, any person served with an appeal petition may file and serve a response supporting or opposing the appeal if he or she wishes to do so. The response should present arguments related to the issues presented on appeal.

(b) *Time limits.* If a person decides to file a response, the response must be filed within fifteen (15) business days after service of the appeal petition.

(c) *Service.* The respondent must serve its response upon the appellant and upon each of the persons identified in the certificate of service attached to the appeal petition pursuant to § 134.1305.

(d) *Reply to a response.* No reply to a response will be permitted unless the Judge directs otherwise.

#### **§ 134.1311 Will the Judge permit discovery and oral hearings?**

Discovery will not be permitted, and oral hearings will not be held.

#### **§ 134.1312 What are the limitations on the introduction of new evidence?**

The Judge may not admit evidence beyond the written protest file nor permit any form of discovery. All appeals under this subpart will be decided solely on a review of the evidence in the written protest file, arguments made in the appeal petition, and response(s) filed thereto.

#### **§ 134.1313 When is the record closed?**

The record will close when the time to file a response to an appeal petition expires pursuant to § 134.1310.

#### **§ 134.1314 When must the Judge issue his or her decision?**

The Judge shall issue a decision, insofar as practicable, within forty-five (45) calendar days after close of the record.

#### **§ 134.1315 What are the effects of the Judge's decision on the procurement at issue?**

The Judge's decision is the final agency decision and becomes effective upon issuance. For the effects of the decision on the procurement at issue, see § 126.803(e) of this chapter.

**§ 134.1316 Can a Judge reconsider an appeal decision?**

(a) Any party who has appeared in the proceeding, or SBA, may request reconsideration of the OHA appeal decision by filing with the Judge and serving a petition for reconsideration on all the parties to the appeal within twenty (20) calendar days after service of the written decision. The request for reconsideration must clearly show an error of fact or law material to the decision. The Judge may also reconsider a decision on his or her own initiative, within twenty (20) calendar days after issuance of the written decision.

(b) The Judge may remand a proceeding to the D/HUB for a new HUBZone status protest determination if the D/HUB fails to address issues of decisional significance sufficiently, does not address all the relevant evidence, or does not identify specifically the evidence upon which it relied. Once remanded, OHA no longer has jurisdiction over the matter, unless a new appeal is filed as a result of the new HUBZone status protest determination.

Isabella Casillas Guzman,  
*Administrator.*

[FR Doc. 2022-26873 Filed: 12/14/2022 8:45 am; Publication Date: 12/15/2022]